No. 79-1952

In the Supreme Cour

OF THE

United States

OCTOBER TERM, 1980

CALIFORNIA MEDICAL ASSOCIATION, et al.,
Appellants,

VS.

FEDERAL ELECTION COMMISSION, et al.,
Appellees.

Appeal From The United States Court Of Appeals For The Ninth Circuit En Banc

JOINT APPENDIX

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APPEAL DOCKETED JUNE 12, 1980
JURISDICTION POSTPONED OCTOBER 6, 1980

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The order and the opinion described below have been omitted from this joint appendix. They appear in the appendix to the Jurisdictional Statement on file herein:

Order Certifying Constitutional Questions to the United States Court of Appeals for the Ninth Circuit and Denying Motion to Dismiss, printed at A-82 (Appendix C).

Opinion of the Ninth Circuit Court of Appeals, filed May 23, 1980, including concurring and dissenting opinions by Judge Choy and Judge Wallace, printed at A-1 (Appendix A).

CHRONOLOGICAL LIST OF DOCKET ENTRIES

U.S. District Court for Northern District of California:

May 7, 1979—plaintiffs' Complaint for Declaratory and Injunctive Relief filed in the U.S. District Court for Northern District of California.

May 17, 1979—plaintiffs' Notice of Motion and Motion for Certification of Constitutional Questions to the United States Court of Appeals for the Ninth Circuit, Memorandum of Points and Authorities, and Affidavits of Bradley Davis and Willis W. Babb, filed.

May 21, 1979—plaintiffs' Affidavits of Sidney E. Foster, M.D., and E. Kash Rose, M.D., filed.

May 29, 1979—FEC's Notice of Motion and Motion to Dismiss with supporting Memorandum of Points and Authorities, filed.

June 4, 1979—plaintiffs' Reply to Defendants' Memorandum in Support of Motion to Dismiss and in Opposition to Plaintiffs' Motion to Certify, filed.

June 5, 1979—Related Case Order filed, case reassigned to Judge William H. Orrick.

July 5, 1979—Minutes of hearing of June 29, 1979, filed, showing defendants' Motion to Dismiss ordered moot and plaintiffs' Motion for Certification of Constitutional Question granted.

July 9, 1979—Order Certifying Constitutional Questions to the United States Court of Appeals for the Ninth Circuit, filed.

July 13, 1979—FEC's Answer, filed.

Ninth Circuit Court of Appeals:

July 16, 1979—case docketed and appearance of counsel entered.

August 1, 1979—Order, by Chief Judge Browning, setting oral argument and directing parties to address the constitutionality of the portion of 2 U.S.C. § 437h(a) which requires the United States Court of Appeals to hear this matter sitting en banc, filed.

October 11, 1979—oral argument and submission of cause to Judges Ely, Wright, Trask, Choy, Goodwin, Wallace, Sneed, Kennedy, Anderson, Hug, and Tang.

May 23, 1980—Opinion by Judge Kennedy, concurring and dissenting opinions by Judge Choy and Judge Wallace, filed.

June 3, 1980—Notice of Appeal to the Supreme Court of the United States, filed.

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United States District Court
for the Northern District of California

Civil Action No. C 79 1089 CFP
Miscellaneous—Federal Election Campaign Act

California Medical Association, a not-for-profit unincorporated association, California Medical Political Action Committee, a political committee, Sidney E. Foster, M.D. and E. Kash Rose, M.D.,

Plaintiffs,

vs.

Federal Election Commission, Honorable Joan D. Aikens, Chairman, Honorable Robert O. Tiernan, Vice-Chairman, Honorable Thomas E. Harris, Commissioner, Honorable John McGarry, Commissioner, Honorable Vernon W. Thompson, Commissioner, Honorable Max Freidersdorf, Commissioner, Honorable J. Stanley Kimmit, Secretary, United States Senate, and Ex-Officio Member of the Federal Election Commission, Honorable Edmund L. Henshaw, Jr., Clerk, House of Representatives and Ex-Officio Member of the Federal Election Commission,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

[Filed May 7, 1979]

Plaintiffs, California Medical Association, California Medical Political Action Committee, Sidney E. Foster, M.D., and E. Kash Rose, M.D., for their complaint against defendants allege:

JURISDICTION

1. This action seeks a judgment declaring that certain provisions of the Federal Election Campaign Act of 1971, as amended ("the Act"), 2 U.S.C. §§ 431 *et seq.*, both on their face and as applied to plaintiffs, constitute an unconstitutional abridgement of plaintiffs' rights, and the rights of their members, to freedom of speech and association, and their rights to due process of law in violation of the First and Fifth Amendments to the Constitution of the United States.

2. This action also seeks a permanent injunction, restraining enforcement of the offending provisions of the Act.

3. Plaintiffs have been and will continue to be irreparably and immediately harmed by the offending provisions of the Act, and a case and controversy exists between the parties within the meaning of Article III of the Constitution of the United States.

4. This court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331(a), 2201 and 2202, and 2 U.S.C. § 437h.

5. Plaintiffs respectfully request expedited consideration of the questions presented, and expedited certification of those questions to the United States Court of Appeals for the Ninth Judicial Circuit (*En Banc*), pursuant to 2 U.S.C. § 437h.

PLAINTIFFS

6. Plaintiff California Medical Association ("CMA") is a not-for-profit unincorporated association, exempt from the payment of Federal income taxes pursuant to 26 U.S.C. § 501(a), and § 501(c) (6). CMA has its headquarters in San Francisco, California. CMA is a membership organization as that term is used in the Act. The membership consists of more than 25,000 California physicians and includes the majority of physicians engaged in the private practice of medicine in California. Members of CMA have voluntarily associated together in the CMA to promote the science and art of medicine, the protection of the public health, and the betterment of the medical profession. To accomplish these purposes, CMA acts to advance and promote its views, and the views of its members, before the legislative, executive and judicial branches of the Federal Government. In addition, CMA provides a forum for the consideration of topics with significant implications for its members and other medical practitioners, and for the public health in general. To help advance and achieve these goals, CMA has established and administers a political action committee—the California Medical Political Action Committee—which engages in political education and makes contributions to candidates for State and Federal office.

7. Plaintiff California Medical Political Action Committee ("CALPAC") is a duly constituted, unincorporated association, which operates as a nonpartisan political action committee. CALPAC has its headquarters in San Francisco, California. CALPAC is a "political committee" as defined by 2 U.S.C. § 431(d) and is registered with the Federal Election Commission in accordance with § 433.

CALPAC qualifies as a "multicandidate political committee," as defined by § 441a (a) (4). CALPAC was established and is administered by CMA. For purposes of the Act, CMA is a "connected organization" for CALPAC, as defined by § 433(b) (2) and 11 C.F.R. § 100.15. CALPAC is CMA's "separate segregated fund" as that term is used in § 441b(b) (2) (C) and 11 C.F.R. § 114.7.

8. CALPAC was organized and operates to promote the improvement of government by encouraging and stimulating physicians and others to take a more active and effective part in governmental affairs; to encourage physicians and others to know and understand the nature and actions of government, political issues and the records of officeholders and candidates; and, to assist physicians and others in organizing for effective political action and to carry out their civic responsibilities. As part of this process CALPAC supports candidates for public office whose views are consistent with and sympathetic to the views of its members. These activities are protected by the First Amendment guarantees of freedom of speech and freedom of association.

9. To advance these goals, contributions to CALPAC are solicited on a nonpartisan basis. The activities of plaintiffs in soliciting contributions to CALPAC include the dissemination of ideas, opinions and political information about matters of vital concern to physicians. The process of soliciting contributions involves the discussion of political, social and economic ideas that have important implications for physicians and the public health. The solicitation of contributions is protected by the First

Amendment guarantees of freedom of speech and freedom of association.

10. Contributions received by CALPAC are, in turn, contributed by CALPAC to candidates for public office, both State and Federal. The process of making contributions to candidates involves the evaluation of candidates, meeting with candidates, and the discussion of issues of interest to plaintiffs, and their members. The process of making contributions is protected by the First Amendment guarantees of freedom of speech and freedom of association.

11. The funds realized from plaintiffs' solicitation activities constitute virtually the only source of revenue for CALPAC. The extent to which CALPAC is able to contribute to candidates for Federal office, and to otherwise engage in protected First Amendment activity, is directly related to the ability to solicit contributions to CALPAC and, correspondingly, CALPAC's ability to use those funds to make contributions. In order to enhance CALPAC's ability to make contributions to Federal candidates and otherwise participate in the political process, CMA traditionally has provided organizational and administrative support for CALPAC. As a result, funds contributed to CALPAC are used primarily as contributions to, or on behalf of, candidates. This mechanism is typical of arrangements between corporations, labor organizations, and other entities, and their sponsored political action committees—known as "separate segregated funds" in the parlance of the Act. In essence, this arrangement allows funds received as contributions from interested persons to be used for direct candidate support, with administrative expenses being funded by another source.

12. Plaintiff Sidney E. Foster, M.D., is a member of CMA and CALPAC. He resides in San Francisco, California, and is eligible to vote for the Office of President of the United States. Dr. Foster serves as Treasurer of CALPAC and is active in CALPAC's political activities.

13. Plaintiff E. Kash Rose, M.D., is a member of CMA and CALPAC. He resides in Napa, California, and is eligible to vote for the Office of President of the United States. Dr. Rose has served as an officer of CMA and CALPAC and continues to be active in matters concerning CMA's support of CALPAC, and the political activities of CALPAC.

14. Plaintiffs are continuing to engage in the exercise of protected First Amendment rights of freedom of speech and association through, *inter alia,* CALPAC's contributions to candidates for Federal office. In providing administrative support for CALPAC, CMA fulfills the intent of contributors by allowing the entire amount contributed to be used for making contributions. CALPAC's ability to contribute to Federal candidates is directly related to CALPAC's ability to use the contributions received to make contributions, and to receive administrative support from CMA.

DEFENDANTS

15. Defendant Federal Election Commission ("the Commission") was established pursuant to 2 U.S.C. § 437c by the Federal Election Campaign Act Amendments of 1974, P.L. 93-443, 88 Stat. 1263. The Commission administers the Act, obtains compliance with its provisions, and formulates

policy with respect to the Act, and Chapters 95 and 96 of the Internal Revenue Code, pursuant to § 437d.

16. Defendant Joan D. Aikens is the Chairman of the Commission. This case is brought against Ms. Aikens solely in her official capacity as a member of the Commission.

17. Defendant Robert O. Tiernan is the Vice-Chairman of the Commission. This case is brought against Mr. Tiernan solely in his official capacity as a member of the Commission.

18. Defendants Max Freidersdorf, John McGarry, Vernon W. Thompson, and Thomas E. Harris are Commissioners and members of the Commission. This case is brought against them solely in their official capacities as members of the Commission.

19. Defendant J. Stanley Kimmit is the duly appointed Secretary of the United States Senate and is, pursuant to the Act, an ex-officio member of the Commission. This case is brought against Mr. Kimmit solely in his official capacity as a member of the Commission.

20. Defendant Edmund L. Henshaw, Jr., is the Clerk of the United States House of Representatives and is, pursuant to the Act, an ex-officio member of the Commission. This case is brought against Mr. Henshaw solely in his official capacity as a member of the Commission.

THE FEDERAL ELECTION CAMPAIGN ACT OF 1971, AS AMENDED

21. The Act, 2 U.S.C. § 431 *et seq.*, establishes limitations on contributions. No person may contribute more than $1,000 to a candidate for Federal office with respect to an

election, pursuant to § 441(a) (1) (A). No multicandidate political committee may contribute more than $5,000 to a candidate for Federal office with respect to an election, pursuant to § 441a(a) (2) (A). Significantly, contributions to a political committee are limited to $5,000 in a calendar year. Section 441a(a) (1) (C) provides that no person shall make contributions:

> to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

22. For purposes of the Act, the term "contribution" includes monetary contributions, and contributions of goods and services—sometimes referred to as in-kind contributions. Section 431(e) states, in pertinent part:

> (e) "contribution"—
>
> (1) means a gift, subscription, loan, advance, or deposit of money or anything of value made *for the purpose of*—
>
> (A) influencing the nomination for election, or election, of any person to Federal office or for the purpose of influencing the results of a primary held for the selection of delegates . . .;
>
> (B) influencing the results of an election held for the expression of a preference for the nomination of persons for election to the office of President of the United States;
>
> (4) means the payment, by any person other than a candidate or a political committee, of compensation for the personal services of another which are rendered to such candidate or political committee without charge for *any such purpose*, . . . (Emphasis added.)

Under Section 431(e), and the pertinent regulation, 11 C.F.R. §100.4, monetary contributions and contributions of goods and services, made to a political committee for the purpose of influencing a Federal election, are considered as "contributions" under the Act. Under the current interpretation of these provisions, when CMA provides administrative support for CALPAC by paying administrative expenses or otherwise providing goods and services it is making a contribution to CALPAC, to the extent the money, goods or services are for the purposes of influencing a Federal election.

23. The Commission's regulations, 11 C.F.R. § 102.6, permit political committees to contribute to both Federal and non-Federal candidates. Pursuant to 11 C.F.R. § 106.1(e) administrative expenses must be allocated in proportion to the amount of funds expended on Federal and non-Federal elections, or on another reasonable basis.

24. Pursuant to § 441b(a), corporations and labor organizations are prohibited from making contributions or expenditures in connection with Federal elections. However, § 441b(b) (2) excludes certain activities from the definition of contribution or expenditure, including administrative support for a political action committee. For example, § 441b(b) (2) (C) provides that the term "contribution or expenditure" shall not include:

> the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

Similarly, § 431(e) (5) (F) states that the term "contribution" does not include:

> any payment made or obligation incurred by a corporation or a labor organization which, under the provisions of § 441b would not constitute an expenditure by such corporation or labor organization;

Similarly, § 431(f)(4)(H) provides that the definition of "expenditure" does not include:

> Any payment made or obligation incurred by a corporation or a labor organization which, under the provisions of § 441b, would not constitute an expenditure by such corporation or labor organization;

Thus, by definition certain payments made to support a political action committee are excepted from the definition of "contributions."

25. Pursuant to §§ 441b(b) (2) (C), 431(e) (5) (F) and 431(f)(4)(H), corporations and labor organizations may make *unlimited* contributions and expenditures for the establishment and administration of, and the solicitation of contributions to, a separate segregated fund to be used for political purposes. Under these provisions corporation or labor organizations may provide *unlimited* amounts as administrative support for their sponsored political action committees.

26. The Act provides, in §§ 437g(a)(5)(C), 437g(a) (7) and 441j, civil and criminal penalties for violations of the contribution limitations established by § 441a. Pursuant to § 441a(f), no political committee may knowingly accept a contribution in violation of § 441a.

27. The reference in § 441b(b)(2)(C) to membership organizations allows unlimited contributions of administrative support by a membership organization, either incorporated or unincorporated, to its political action committee. Nevertheless, the Commission has interpreted the Act to limit contributions by an unincorporated membership organization to its separate segregated fund—or political action committee—to $5,000 per calendar year.

28. Under the Commission's interpretation payments by an unincorporated membership organization in support of its political action committee are limited to $5,000 per year, while corporations and labor organizations may provide unlimited administrative support for their political action committees. With this interpretation, payments by CMA to or on behalf of CALPAC, made for the purpose of establishing, administering and soliciting contributions to CALPAC, are limited to $5,000 per calendar year. There is no similar limitation on corporations, labor organizations, or even on membership organizations that are incorporated. It is evident the application of a $5,000 calendar year limitation is based solely on the fact that CMA is an *unincorporated* membership organization.

29. The ability of plaintiffs to engage in effective political activity, and specifically the effective participation by CALPAC in Federal campaigns, is dependent on the ability of CMA and CALPAC to solicit contributions for CALPAC, and in turn, CALPAC's ability to use funds received as voluntary contributions to make contributions to candidates for Federal office. To the extent voluntary contributions received by CALPAC are used to defer administrative expenses, rather than being contributed to

candidates for Federal office, CALPAC's ability to participate in Federal elections is curtailed. If CMA's administrative support of CALPAC allocable to Federal activities is limited to $5,000 per calendar year, CALPAC will be required to use a portion of the voluntary contributions it receives, which are intended for use as contributions to candidates for public office, to cover administrative expenses. Alternatively, CALPAC will be forced to limit its activity with respect to Federal elections to conform to an administrative support budget of $5,000 per calendar year.

30. In contrast, political action committees sponsored by a corporation or a labor organization, which operate as a separate segregated fund as that term is used in § 441b(b)(2)(C), are able to use all funds received as contributions to make contributions to, or expenditures on behalf of, candidates for Federal office. The costs of establishing the political action committee, administrative expenses incurred by the committee and costs of soliciting contributions to the committee may be provided in full, without any limitation, by the sponsoring corporation or labor organization. By comparisn, CMA is limited in its sponsorship of CALPAC to $5,000 per calendar year for Federal activities. The net effect of this limitation is to curtail Federal election activities by CALPAC. In relative terms this enhances the effectiveness of political action committees established and administered by corporations or labor organizations. This interpretation imposes a substantial restraint on the ability of CMA to provide administrative support to CALPAC, and on the ability of CALPAC to participate in Federal campaigns.

31. Section 441b(b)(2)(C), § 431(e)(5)(F), § 431(f)(4)(H) and § 441a(a)(1)(C), on their face and as interpreted and applied by the Commission, are an unconstitutional abridgement of the plantiffs' rights of freedom of speech and association to the extent they have been, or may be, interpreted to impose a $5,000 calendar year limitation on CMA's administrative support for CALPAC, because these provisions abridge:

a. the ability of plaintiffs to communicate political ideas, opinions, and information;

b. the ability of plaintiffs to solicit contributions for use in Federal campaigns;

c. the ability of plaintiffs, and their members, to associate with each other, and with other concerned individuals, for the purpose of participating in Federal elections;

d. CMA's ability to absorb the costs of establishing and administering a political action committee which is active in Federal campaigns;

e. CALPAC's ability to receive administrative support and make contributions to candidates for Federal office;

f. plaintiffs' ability to compete on equal terms with corporations and labor organizations which establish or administer political action committees that are active in Federal campaigns.

32. Section 441b(b)(2)(C), § 431(e)(5)(F), § 431(f)(4)(H) and § 441a(a)(1)(C), on their face, and as interpreted by the Commission, arbitrarily, capriciously, and invidiously discriminate against CMA and its members in

violation of their rights to due process of law and equal protection of law under the Fifth Amendment to the Constitution of the United States, in that these provisions limit the amount which CMA may contribute as administrative support of CALPAC to $5,000 per calendar year, whereas corporations and labor organizations which establish and administer a political action committee are not subject to any such limitation.

33. Section 441b(b)(2)(C), § 431(e)(5)(F), § 431(f)(4)(H) and § 441a(a)(1)(C), on their face and as interpreted by the Commission, arbitrarily, capriciously, and invidiously discriminate against CALPAC and its members in violation of their rights to due process of law and equal protection of law under the Fifth Amendment to the Constitution of the United States, in that these provisions subject CALPAC to a $5,000 calendar year limitation on amounts which may be received as administrative support from CMA. The effect of this limitation is to require CALPAC to curtail its Federal activities, or to use voluntary contributions it receives to cover administrative expenses rather than as contributions to candidates. In contrast, the political action committees established and administered by corporations—including incorporated membership organizations—and labor organizations may receive unlimited support from the sponsoring corporation or labor organization.

34. The harm caused by the Commission's interpretation of §§ 441b(b)(2)(C), 431(e)(5)(F), 431(f)(4)(H) and 441a(a)(1)(C), as applied to CMA and CALPAC, is actual and not speculative or hypothetical. Fearing the imposition

of both civil and criminal sanctions provided by the Act, CALPAC has limited its activity in Federal elections since first learning of the Commission's interpretation. Plaintiffs desire to continue to participate vigorously in Federal election activities, but have curtailed these activities because of the Commission's interpretation of the sections in question and plaintiffs' apprehension that CMA and CALPAC may be subject to civil and criminal sanctions. Indeed, plaintiffs have been advised that in April, 1979 the Commission, pursuant to § 437g(a)(5)(B), found probable cause to believe CMA and CALPAC may have violated §§ 441a(a)(1)(C) and 441a(f), respectively, because of CMA's administrative support of CALPAC. A finding of probable cause may lead to an enforcement action pursuant to § 437g(a)(5)(B).

Wherefore, plaintiffs respectfully request that this complaint be immediately certified to the Court of Appeals for the Ninth Judicial Circuit, for determination by the Court *En Banc,* pursuant to 2 U.S.C. § 437h, and that a judgment be entered:

1. Declaring 2 U.S.C. § 441b(b)(2)(C), § 431(e)(5)(F), § 431(f)(4)(H) and § 441a(a)(1)(C) unconstitutional in violation of the First Amendment to the Constitution of the United States, to the extent these provisions on their face, or as interpreted and applied by the Commission, limit the amount which CMA may contribute as administrative support to CALPAC, and the amount CALPAC may receive from CMA as administrative support, to $5,000 per calendar year;

2. Declaring 2 U.S.C. § 441b(b)(2)(C), § 431(e)(5)(F), § 431(f)(4)(H) and § 441a(a)(1)(C) unconstitutional in violation of the Fifth Amendment to the Constitution of the United States, to the extent that these provisions on their face, or as interpreted and applied by the Commission, limit the amount which CMA may contribute as administrative support to CALPAC, and the amount CALPAC may receive from CMA as administrative support, to $5,000 per calendar year;

3. Permanently enjoining defendants from enforcing the provisions of 2 U.S.C. § 441a(a)(1)(C) as to CMA for providing administrative support mentioned in § 441b(b)(2)(C) to CALPAC in excess of $5,000 per calendar year;

4. Permanently enjoining the enforcement of 2 U.S.C. § 441a(f) against CALPAC insofar as CALPAC is alleged to have received contributions of administrative support from CMA in excess of $5,000 per calendar year.

Dated: May 7, 1979

Respectfully submitted,

HASSARD, BONNINGTON, ROGERS & HUBER

By: /s/ Rick C. Zimmerman
Attorneys for Plaintiffs

United States District Court
For the Northern District of California

RELATED CASE ORDER

[Filed June 5, 1979]

A notice of related cases has been filed suggesting that the following cases are related within the meaning of Local Rule 205-2 or Local Rule 320-1.

C-79-1197-ACW—Federal Election Commission v. California Medical Association and California Medical Political Action Committee

C-79-1089-CFP—California Medical Association et al. v. Federal Election Commission

M-77-306-C(WHO)—Federal Election Commission v. California Medical Political Action Committee

As the Judge assigned the earliest filed case, I advise the Assignment Committee that these cases are not related.

United States District Judge

As the Judge assigned the earliest filed case, I advise the Assignment Committee that these cases are related within the meaning of Local Rule 205-2 or Local Rules 320-1.

/s/ Wm. H. Orrick
United States District Judge

Order

It appearing to the Assignment Committee that these cases are related within the meaning of Local Rule 205-2 or Local Rule 320-1, IT IS ORDERED that all of such cases

are reassigned to the Honorable William H. Orrick. Counsel are instructed that all future filings shall bear the initials WHO immediately after the case number. All matters presently scheduled for hearing are vacated and should be re-noticed for hearing before the judge to whom the case has been reassigned.

Dated: 5 Jun 1979

For the assignment committee:

/s/ Robt. Ruth
Chief Judge

New Case Clerk:

Copies to: Courtroom Deputies
Special Projects
Reassignment Log Noted WHO
ACW Ballot Replaced in Category #15
CFP Ballot Replaced in Category #13

Case System Administrator:

Copies to: All Counsel
Transferor CSA Log Book Noted

Rel Case 2 Rev 9-78

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Counsel for all named defendants

United States District Court
for the Northern District of California

Civil Action No. C-79-1089-WHO

California Medical Association, et al.,
Plaintiffs,

vs.

Federal Election Commission, et al.,
Defendants.

ANSWER

[Filed July 13, 1979]

Defendants Federal Election Commission (hereinafter "the Commission") *et al.* answer the numbered paragraphs of the complaint as follows:

1. Defendants deny that part of paragraph 1 which alleges that plaintiffs have pleaded that certain provisions of the Federal Election Campaign Act of 1971, as amended, are unconstitutional on their face and admit the balance of the allegations in paragraph 1.

2. Defendants admit that part of paragraph 2 which alleges that this action seeks a permanent injunction re-

straining enforcement of provisions of the Act, but deny that any of these provisions offend the Constitution of the United States.

3. Defendants deny the allegations in paragraph 3.

4. Defendants deny the allegations in paragraph 4.

5. Defendants admit the allegation in paragraph 5, but aver that the review procedures of 2 U.S.C. § 437h are not available here.

6. Defendants admit those parts of paragraph 6 which allege that plaintiff California Medical Association (hereinafter "CMA") is a not-for-profit unincorporated association, that CMA has its headquarters in San Francisco, California, that its membership consists of more than 25,000 California physicians and includes the majority of physicians engaged in the private practice of medicine in California, and that CMA organized and administers a political committee, the California Medical Political Action Committee (hereinafter "CALPAC"), which makes contributions to candidates for State and Federal office. Defendants deny that CMA is a membership organization within the meaning of 2 U.S.C. § 441b(b)(2)(C) and (4)(C) which concern only incorporated membership organizations. Defendants are without knowledge or information sufficient to form a belief as to the truth of the balance of the allegations in paragraph 6.

7. Defendants admit those parts of paragraph 7 which allege that plaintiff CALPAC is an unincorporated association which operates as a nonpartisan political committee, that CALPAC has its headquarters in San Francisco, Cali-

fornia, that CALPAC is a "political committee" as defined by 2 U.S.C. § 431(d) and is registered with the Commission, that CALPAC qualifies as a "multicandidate political committee" as defined by 2 U.S.C. § 441a(a)(4), that CALPAC was organized and is administered by CMA, and that CMA is CALPAC's "connected organization" as defied by 2 U.S.C. § 433(b)(2) and 11 C.F.R. § 100.15. Defendants deny that CALPAC is CMA's "separate segregated fund" as that term is used in 2 U.S.C. § 441b(b)(2)(C) and 11 C.F.R. § 114.7 and aver that the term "separate segregated fund" refers to a fund utilized for political purposes by incorporated organizations or labor organizations only.

8. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 8 and 9.

9. Defendants admit that part of paragraph 10 which alleges that contributions received by CALPAC, are in turn, contributed to candidates for public office, both State and Federal. Defendants are without knowledge or information sufficient to form a belief as to the truth of the balance of the allegations in paragraph 10.

10. Defendants admit those parts of paragraph 11 which allege that CMA traditionally has provided organizational and administrative support for CALPAC and that funds contributed to CALPAC are used primarily as contributions to, or on behalf of, candidates. Defendants deny that entities other than corporations or labor organizations have "separate segregated funds" within the meaning of the Federal Election Campaign Act of 1971, as amended.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the balance of the allegations in paragraph 11.

11. Defendants admit those parts of paragraphs 12 and 13 which allege that plaintiff Sidney E. Foster serves as Treasurer of CALPAC and that plaintiff E. Kash Rose has served as an officer of CMA and CALPAC. Defendants are without knowledge or information sufficient to form a belief as to the truth of the balance of the allegations in paragraphs 12 and 13.

12. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 14.

13. Defendants admit the allegations in paragraph 15.

14. Defendants admit that part of paragraph 16 which alleges that at the time of the filing of the complaint Joan D. Aikens was Chairman of the Commission and aver that since that time Robert O. Tiernan has succeeded her in that post and that Joan D. Aikens remains a member of the Commission. Defendants admit that this case is brought against her solely in her official capacity.

15. Defendants admit that part of paragraph 17 which alleges that at the time of the filing of the complaint Robert O. Tiernan was the Vice-Chairman of the Commission and aver that since that time Max Freidersdorf has succeeded him in that post and that Robert O. Tiernan remains a member of the Commission. Defendants admit that this case is brought against him solely in his official capacity.

16. Defendants admit the allegations in paragraphs 18 through 20.

17. Defendants admit the allegations in paragraphs 21 through 22.

18. Defendants admit that part of paragraph 23 which alleges that political committees may as a general rule contribute to both Federal and non-Federal candidates and aver that 11 C.F.R. § 102.6 regulates the manner in which such committees must operate. Defendants admit the balance of the allegations in paragraph 23.

19. Defendants admit that part of paragraph 24 which alleges that 2 U.S.C. § 441b(a) prohibits corporations and labor organizations from making contributions or expenditures in connection with Federal elections and admit that the language of 2 U.S.C. §§ 441b(b)(2)(C) and 431(e)(5)(F) and (f)(4)(H) is as quoted in paragraph 24. Defendants deny that 2 U.S.C. §§ 441b(b)(2)(C) and 431(e)(5)(F) and (f)(4)(H) exclude administrative support of any and all political action committees from the definition of contribution or expenditure and aver that those provisions exclude from the term "contribution or expenditure" in § 441b(a), the definition of "contribution" in § 431(e), and the definition of "expenditure" in § 431(f) the administrative support given only by a corporation or labor organization to its separate segregated fund.

20. Defendants admit that part of paragraph 25 which alleges that, pursuant to 2 U.S.C. §§ 441(b)(b)(2)(C) and 431(e)(5)(F) and (f)(4)(H), a corporation or a labor organization may make unlimited contributions or expendi-

tures for the establishment and administration of, and the solicitation of contributions to, a separate segregated fund to be used for political purposes and aver that under these provisions a corporation or a labor organization may provide unlimited amounts as administrative support for its separate segregated fund. Defendants deny that a corporation or labor organization may provide unlimited amounts as administrative support for any and all "sponsored political action committees," a term not defined in the Act or regulations.

21. Defendants admit the allegations in paragraph 26.

22. Defendants deny the allegation in paragraph 27 that the reference in 2 U.S.C. § 441b(b)(2)(C) to membership organizations allows unlimited contributions of administrative support by an unincorporated membership organization to any political committee and aver that § 441b(b)(2)(C) is no more than an exemption from the prohibition of contributions or expenditures by corporations and labor organizations set forth in 2 U.S.C. § 441b(a). Defendants admit that the Commission has interpreted the Act to limit contributions by an unincorporated membership organization as specified in 2 U.S.C. § 441a(a)(1) and aver that the face of the statute compels this result.

23. Defendants admit the allegations in paragraph 28 and aver that the face of the statute compels this result.

24. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 29.

25. Defendants admit those parts of paragraph 30 which allege that CMA is limited in its sponsorship of

CALPAC to $5,000 per calendar year for Federal activities and that corporations and labor organizations are not so limited with respect to their separate segregated funds. Defendants are without knowledge or information sufficient to form a belief as to the truth of the balance of the allegations in paragraph 30.

26. Defendants deny the allegations in paragraphs 31 and 32.

27. Defendants admit those parts of paragraph 33 which allege that 2 U.S.C. §§ 441b(b)(2)(C), 431(e)(5)(F) and (f)(4)(H), and 441a(a)(1)(C) subject CALPAC to a $5,000 calendar year limitation on amounts which may be received as administrative support from CMA and that the separate segregated funds established and administered by corporations—including incorporated membership organizations—and labor organizations may receive unlimited support from the sponsoring corporation or labor organization. Defendants are without knowledge or information sufficient to form a belief as to effect of this limitation on CALPAC. Defendants deny the balance of the allegations in paragraph 33.

28. Defendants admit those parts of paragraph 34 which allege that plaintiffs CMA and CALPAC have been advised that in April, 1979 the Commission, pursuant to 2 U.S.C. § 437(g)(a)(5)(B), found probable cause to believe CMA and CALPAC may have violated 2 U.S.C. § 441(a)(1)(C) and (f), respectively, because of CMA's administrative support of CALPAC and that a finding of probable cause may lead to an enforcement action pursuant to 2

U.S.C. § 437g(a)(B). Defendants are without knowledge or information sufficient to form a belief as to the truth of the balance of the allegations in paragraph 34.

Defendants aver as an affirmative defense that this court lcks subject matter jurisdiction over the complaint and reassert the arguments set forth in their Motion to Dismiss.

Respectfully submitted,

/s/ William C. Oldaker
William C. Oldaker
General Counsel

/s/ David S. Branch
David S. Branch
Assistant General Counsel

/s/ Scott E. Thomas
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No. 79-4426

United States Court of Appeals
for the Ninth Circuit

California Medical Association, et al.,
Plaintiffs-Appellants,

vs.

Federal Election Commission, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California

Before: BROWNING, Circuit Judge.

ORDER

[Filed Aug. 1, 1979]

The court will hear oral argument in this case on Thursday, October 11, 1979 at 2:30 p.m. in San Francisco, California.

In addition to the questions certified by the United States District Court for the Northern District of California, in its order of July 9, 1979, the parties are requested to address the constitutionality of the portion of 2 U.S.C. § 437h(a) which requires the United States Court of Appeals to hear this matter sitting en banc.

Appellant will make suitable arrangements for furnishing this court with sixteen (16) copies of the trial court record.

The certificate of record is ordered filed as of August 1, 1979.

Appellant's opening brief is to be filed by August 22, 1979.

Appellee's brief is to be filed by September 12, 1979.

Appellant's reply brief, if any, is to be filed by September 19, 1979.

/s/ James Browning
United States Circuit Judge
Chief Judge

Supreme Court of the United States

No. 79-1952

California Medical Association, et al.,
Appellants,

v.

Federal Election Commission, et al.

Appeal from the United States Court of Appeals for the Ninth Circuit.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

October 6, 1980